

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 10, 2004 Session

KEVIN EDWARD CRAIG v. JULIE ANN CRAIG

**Appeal from the Circuit Court for Sevier County
No. 2001-0668-III Rex Henry Ogle, Judge**

No. E2003-02479-COA-R3-CV - FILED AUGUST 26, 2004

The Trial Court awarded a divorce to Kevin Edward Craig (“Husband”) based on the admitted adultery of Julie Ann Craig (“Wife”) and after specifically finding Wife was not telling the truth regarding her allegations of inappropriate marital conduct by Husband. The Trial Court concluded it was in the best interests of the children to designate Wife as the primary residential parent of the parties’ two minor sons. The Trial Court also determined how much equity was in the marital residence and awarded one-half of the entire amount to Wife, even though the property was owned by Husband and both of his parents. The Trial Court refused to award Wife any attorney fees. We modify the award to Wife of one-half of the entire equity in the marital residence. We affirm the Trial Court’s award of a divorce to Husband and its judgment designating Wife as the primary residential parent.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Affirmed as Modified; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and SHARON G. LEE, JJ., joined.

Franz F. Springmann, Sr., Sevierville, Tennessee, for the Appellant Kevin Edward Craig.

L. Caesar Stair, III, and Margo J. Maxwell, Knoxville, Tennessee, for the Appellee Julie Ann Craig.

OPINION

Background

In September of 2001, Husband filed a complaint seeking a divorce from Wife after approximately nine and one-half years of marriage. When the complaint was filed, Husband was thirty-nine years old, Wife was thirty-two, and their two sons were ages four and one. In the complaint, Husband claimed Wife was guilty of inappropriate marital conduct or, in the alternative, that irreconcilable differences had arisen between the parties. Husband sought to be the primary residential parent of the two minor children or, at a minimum, to be awarded equal co-parenting time. Husband also claimed Wife had moved to Florida with the two children and refused to apprise him of her current address.

Wife answered the complaint claiming she secured employment and moved to Florida with the children only after Husband agreed that she could do so. Wife generally denied being guilty of any inappropriate marital conduct, although she admitted that irreconcilable differences had arisen between the parties. Wife asserted that she should be the primary residential parent for the two children. Wife also filed a counterclaim asserting that Husband was guilty of inappropriate marital conduct.

Husband was the first witness at the trial on August 5, 2003. Husband testified his gross wages in 2002 were \$54,375.20, excluding certain funds which were placed into a retirement account. Husband confirmed the information contained in an Affidavit of Expenses and Income previously filed by him with the Court. This affidavit showed Husband's net monthly income was \$3,411.71. Husband's monthly expenses, including child support payments, totaled \$3,821.28, thereby resulting in a net monthly loss of \$409.57. Husband testified that his aunt, Charlotte Groseclose, had been making mortgage payments on his behalf. He currently owed his aunt \$24,000. Husband also borrowed approximately \$450 from his mother to repair the well at the house and his mother also paid his share of the costs from the partially successful mediation.

Approximately nine months after the trial was completed and while this appeal was pending, Wife filed a motion to consider post-judgment facts, which we granted. The post-judgment facts centered around Husband's loss of employment effective April 10, 2004. Husband had maintained health insurance on the children until he lost his job, but he declined to extend health insurance coverage on the children through COBRA. Husband claimed he was unable to afford the premiums which were approximately \$1,000 per month.

Husband testified at trial that Wife worked as a radiation therapist until approximately six months before their first son was born. Thereafter, Wife worked infrequently on an as needed basis at Baptist Hospital. Prior to losing his job, Husband was employed as the director of golf at Eagle's Landing and his work duties permitted him to arrange his schedule in such a way that he could assist with caring for the children. Husband testified that on Saturdays, Wife would "get out

and spend a little quality time by herself.” Wife was gone most of the day on Saturdays and Husband was the sole caregiver for the children during this time.

Husband expressed his love for his two sons and stated they loved him as well. Husband candidly acknowledged that Wife also loved the children and they loved her. Husband wanted his children to return to Tennessee to be with him. Husband also has many family members in the East Tennessee area. According to Husband, on several occasions when he has returned his older son to Wife, she has had to pull the little boy off of Husband because he did not want to leave. Husband stated that during their marriage, more often than not, Wife would go to bed before the children. This was fine with Husband because it gave him time to spend with the boys. Husband completed an approved parenting class. Husband described his health as “excellent.”

Husband thought everything was fine with the marriage until May of 2001. After the parties separated, Husband learned that Wife had been making regular phone calls to Rob Clark (“Mr. Clark”) starting in May. According to Husband, Wife and the children went to Florida on August 4th along with Husband’s parents. While in Florida, Wife apparently got into an argument with Husband’s father and went to Mr. and Mrs. Clark’s house and stayed there for the rest of the month. Mr. Clark was formerly a family friend and is Wife’s current employer. When Wife and the children returned from Florida, Husband took the next day off from work so he could spend time with Wife and the children. However, Wife told Husband she could not spend any time with him because she had an appointment with an attorney. On September 7th, Husband returned home from work to find that Wife was gone and that she had taken the children. Wife left a note saying she was going to stay with friends but refused to say who or where the friends were. Wife simply told Husband that if he needed to talk to her, he could call her on her cell phone. Husband testified he agreed Wife could take the children on a visit to Florida while she looked for a job, but he never agreed that she could permanently move the children to Florida. According to Husband, Mr. Clark initially offered Wife a part-time job which she could have performed in Tennessee. However, Wife later moved to Florida and started working for Mr. Clark on a full-time basis. Husband stated he has encountered “nothing but problems trying to see the children” since Wife moved to Florida and detailed the various problems he has encountered. Husband also has had difficulties being able to speak with the children on the telephone because of various actions of Wife.

Husband does not believe Wife provides a stable environment for the children. Her employer, Mr. Clark, is a married man with whom Wife is having an affair. Wife has moved several times and the older child has been in three different schools. The older son has been receiving therapy while in Florida. The younger child broke his arm and has had pneumonia on more than one occasion. Husband testified that his family in East Tennessee would assist him in caring for the children if needed and if he is designated as the primary residential parent.

Not surprisingly, Wife’s testimony was quite different from Husband’s in many respects. As background, Wife has an associate’s degree in radiological technology and a bachelor’s degree in radiation therapy. When the parties moved to Tennessee, Wife secured employment at Baptist Regional Cancer Center in Morristown. Wife was working at Knoxville Urology Associates

in Knoxville at the time she took a medical leave while pregnant with the parties' first child. At the time of trial, Wife was working full-time for The Clark Company in St. Augustine, Florida. The Clark Company specializes in developing Christian schools and nonprofit organizations. Wife is the executive director of client services. When Wife first became employed by The Clark Company in September of 2001, her salary was \$42,000 per year. Wife currently earns \$48,500 and believes her job is very stable and that it will remain stable even if Mrs. Clark finds out about the affair Wife had with Mr. Clark.

Wife testified to what she characterized as sexual and emotional abuse by Husband. For example, Wife claimed Husband would insist they watch pornography and he eventually insisted that they use various sex toys. Wife testified using the sex toys was very degrading and she agreed to use them only to please Husband who would not stop insisting. According to Wife, approximately a year and a half before she left Husband, he began insisting that Wife have sex with another man or woman and that he be allowed to watch, but Wife consistently refused. The reason Wife claims she left Husband was the continual emotional and sexual abuse she endured throughout the marriage.

According to Wife, Husband kept talking about bringing another man into the house for her to engage in sexual relations with and this scared her. The marriage was "really on the rocks" when Wife went to Florida with the children and Husband's parents. While in Florida, Wife and Husband's father got in an argument, and he told her to leave the house. Wife went over to Mr. and Mrs. Clark's house. Wife claimed she and Mr. Clark were not having a sexual relationship at that time. Mr. Clark eventually offered Wife full-time employment in Florida. Wife admitted she eventually had an affair with Mr. Clark, but claimed the affair was now over and their relationship was purely as colleagues and friends. Family coverage health insurance will be available through Wife's employer, but Wife stated it will be expensive. Wife acknowledged she was waiting for the divorce litigation to be over so she would "know if I need to get [health insurance] for myself and the boys or just for me or the boys or how I need to do that."

Wife described the older child as very bright, inquisitive and loving. The younger child is also very bright and loving, but is more rambunctious. Wife takes the children to various parks in the neighborhood and to the zoo, movies, the library, etc. Wife has some flexibility in her work hours and she is able to work at home and tend to the children when they are sick. Wife testified she has always been the children's primary caregiver and she was the person who took the children to doctor appointments, prepared their meals, gave them baths, etc. Wife claimed Husband rarely assisted with these activities. In direct contrast to Husband's testimony, Wife stated she actively encouraged the children to call Husband and also encouraged visits between Husband and the children.

Wife also filed an Affidavit of Expenses and Income and testified to its contents at trial. Wife's monthly net income, including child support payments, totaled \$4,269.12. Wife's total monthly expenses were \$6,473, leaving a net monthly loss of \$2,203.88. Wife's net monthly expenses included \$1,950 in payments toward almost \$65,000 in credit card debt which Wife

accumulated after the parties separated. A portion of this credit card debt includes payment of attorney fees and expenses related to the present litigation.¹

Sherry Risch (“Risch”), a clinical psychologist, was called as an expert witness on Wife’s behalf. Risch was contacted by Wife to assess Wife’s parenting skills and the adjustment of the children to moving to Florida. Risch met with Wife and the children on several occasions and even visited Wife’s apartment. Risch has met with the children’s teachers and their therapist. Risch stated that Wife was a very well-adjusted individual and both of the children were as well. The older child’s kindergarten teacher informed Risch that he was doing very well. The older child’s social and emotional development were within normal limits and there were no behavioral problems. There was a strong bond between Wife and the children. Because Risch did not evaluate Husband, she acknowledged she could not offer any opinion regarding which parent should be awarded custody. However, she could and did say that Wife certainly was able to properly parent the children.

After the proof was completed, the Trial Court made several rulings from the bench. First, the Trial Court found Husband was entitled to a divorce on the grounds of Wife’s admitted adultery. The Trial Court also stated that Wife “has done quite a bit to impede [Husband’s] visitation.” With regard to Wife’s moving to Florida, the Trial Court found that the real reason she moved to Florida was to be close to her married lover. The Trial Court went on to add, however, that what was important with regard to custody was what was in the best interest of the children. More specifically, the Trial Court pointed out that in making a determination regarding custody, it could not punish Wife for moving to Florida to be with her lover or “lying to this Court about things that took place in the home This Court has to make its judgment going forward about what is in the present and foreseeable best interest of these children.” The Trial Court discussed the testimony of Risch and others to the effect that the children were quite well adjusted to their home in Florida. As between Husband and Wife, the Trial Court concluded it was “clear” that it was in the best interest of the children for Wife to be the primary residential parent.

On September 4, 2003, the Trial Court entered its Final Judgment. As pertinent to this appeal, the Trial Court granted Husband a divorce, but designated Wife as the primary residential parent. However, the Trial Court added the following:

[Wife is] awarded the primary residential custody of the parties’ minor children on a temporary basis to see if she is willing to comply without interference with the Orders of the Court as it relates to [Husband’s] visitation and contact with the children....

¹ Wife’s Affidavit of Expenses and Income also included \$239 per month for health insurance. Wife admitted, however, that she was not paying anything for health insurance at that time. Wife included this expenses because she anticipated having “to start paying something.”

With regard to the marital residence, the Trial Court concluded there was \$51,000 in equity which was marital property and which should be divided equally between the parties. The Trial Court also ordered each party to be responsible for one-half of the children's outstanding medical expenses not covered by insurance. Finally, the Trial Court held that each party was responsible for his or her own attorney fees.

Husband appeals raising three issues. First, Husband claims the Trial Court erred in designating Wife as the primary residential parent. Next, Husband claims the Trial Court erred in awarding Wife a "disproportionate amount of equity in a home owned by the Husband and his parents." Husband's final issue is whether he should be held responsible for one-half of the outstanding medical bills on the children. Wife also appeals, claiming the Trial Court erred in not awarding her a divorce based on Husband's inappropriate marital conduct. Wife also claims the Trial Court erred when it stated in the Final Judgment that the designation of Wife as the primary residential parents was only to be on a temporary basis. Finally, Wife claims the Trial Court erred in not awarding her attorney fees.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We first will address Wife's claim that the Trial Court erred by not granting her an absolute divorce from Husband based on his alleged inappropriate marital conduct. In making this argument, Wife wisely does not challenge the Trial Court's granting of a divorce to Husband based on her admitted adultery. Wife testified to years of emotional and sexual abuse she claims to have endured at the hands of Husband. According to Wife, this abuse began when Husband started purchasing pornographic videos and magazines. Husband then began insisting that Wife use "perverse" sex toys and repeatedly pressured her to have "'swinger' relations, e.g., to have sexual relations with another man or woman while Husband would participate or watch or videotape the sex act." Wife claimed Husband's conduct eventually resulted in her seeking therapy once she moved to Florida. Not surprisingly, Husband denied forcing Wife to engage in any sexual activity against her will. Husband altogether denied ever suggesting Wife have sex with a third party.

In resolving the conflicting testimony regarding whether Wife was forced to engage in sexual acts against her will or was otherwise sexually or emotionally abused, the Trial Court noted it was forced to "make certain findings about the credibility" of the witnesses, which it did when it stated as follows:

I find it most incredible and unbelievable that a person who is as intelligent, as strong as she appeared here on the witness stand as this wife, could be forced to commit those acts that she now claims were so gross to her. And, in fact, the Court looking at ... collective Exhibit 50 are a series of cards that the wife gave to the husband talking about sex....

The Court further finds that she apparently ... made no complaint to anyone else about any sexual abuse or fear of her husband as a consequence of that until she left to go to Florida to go to work for the man she had an affair with. That strikes me as unbelievable, and I find that on that issue she has no credibility; that her credibility has been totally destroyed by her own testimony [T]he Court finds that she has failed to meet her burden of proof as to grounds of divorce by a preponderance of the evidence and therefore the court awards the husband a divorce upon the grounds of adultery.

The Trial Court also noted there were sexual abuse and crisis centers in East Tennessee designed to protect people from immediate threats of violence and Wife “took no advantage of that.” Instead, she sought counseling once she moved to Florida to be with her lover, a development the Trial Court described as “very convenient.”

The Trial Court’s factual conclusion as to whether Husband engaged in any inappropriate marital conduct was based almost exclusively on witness credibility. Wife’s therapist was called as a witness at trial to support Wife’s allegations, but the therapist admittedly had no independent knowledge of whether any of this claimed activity actually took place and was relying solely on what Wife told her. The Trial Court had the opportunity to observe Husband, Wife, the other witnesses, and evaluate the documentary evidence admitted at trial including sexually suggestive cards sent by Wife to Husband. After hearing all of the proof, the Trial Court concluded Wife was lying and expressly stated such. The Trial Court’s factual determination involving witness credibility will be given great weight on appeal. *See Barnhill v. Barnhill*, 826 S.W.2d 443, 448 (Tenn. Ct. App. 1991)(citing *Town of Alamo v. Forcum-James Co.*, 205 Tenn. 478, 327 S.W.2d 47 (1959)). We do not believe the evidence preponderates against the Trial Court’s conclusion that Wife failed to meet her burden of proof on this issue. We, therefore, affirm the Trial Court’s conclusion that only Husband was entitled to a divorce.

The standard of review on appeal for issues addressing child custody and visitation was set forth by our Supreme Court in *Suttles v. Suttles*, 748 S.W.2d 427 (Tenn. 1988), and recently reaffirmed in *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001). In *Suttles*, the Court acknowledged the general rule that:

Although ... “the details of custody and visitation with children are peculiarly within the broad discretion of the trial judge,” *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. App. 1973), and that the trial court's decision will not ordinarily be reversed absent some abuse of that discretion, “in reviewing child custody and visitation cases, we must remember that the welfare of the child has always been the paramount consideration” for the courts. *Luke v. Luke*, 651 S.W.2d 219, 221 (Tenn. 1983)....

Suttles, 748 S.W.2d at 429. The Supreme Court further explained the abuse of discretion standard in *Eldridge*, stating:

Under the abuse of discretion standard, a trial court’s ruling “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

Eldridge, 42 S.W.3d at 85.

The factors to be considered by the court in child custody matters are set forth in Tenn. Code Ann. § 36-6-106(a) and include, but are not limited to, the love, affection and emotional ties existing between the parents and child; the disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care; the degree to which a parent has been a primary caregiver; the importance of continuity in the child’s life and the length of time the child has lived in a stable, satisfactory environment; the stability of the family unit of the parents; the mental and physical health of the parents; the home, school, and community record of the child; and each parent’s past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and other parent, consistent with the best interest of the child. In addition, Tenn. Code Ann. § 36-6-101(d) establishes “the legislative intent that the gender of the party seeking custody shall not give rise to a presumption of parental fitness or cause a presumption or constitute a factor in favor or against the award of custody to such party.”

Husband claims the Trial Court failed to compare the relative fitness of the parties since most of the relevant factors contained in Tenn. Code Ann. § 36-6-106(a) favor Husband.² In its memorandum opinion, the Trial Court did not list each of the applicable factors and explain how that particular factor impacted its overall decision. While this statute does require a trial court to consider all of the listed factors which are applicable, it does not require a trial court, when issuing a memorandum opinion or final judgment, to list every applicable factor along with its conclusion as to how that particular factor impacted the overall custody determination.³

It is important to note that the Trial Court did *not* conclude Husband was an unfit parent. The Trial Court correctly noted that both parties had strong and some not-so-strong areas which were relevant to its decision. There is no doubt that some of the relevant factors favor Wife, and others favor Husband, which is often the case. For example, the Trial Court found Wife had been the children's primary caregiver. The Trial Court also was impressed favorably with the testimony of Risch who essentially testified that Wife and the children were doing quite well in Florida and Wife was able to take care of the children. On the other hand, Wife fell short on her ability to facilitate and encourage a close and continuing relationship between Husband and the children.

It is implicit in the Trial Court's ruling that it found both Wife and Husband to be fit parents. We agree that they are. However, after reaching this conclusion, the Trial Court then was confronted with the daunting task of determining which of these two fit parents should be designated the primary residential parent in accordance with the best interests of the children. We are convinced from our review of the entire record that the Trial Court did consider all relevant factors when it found that it was in the best interest of the children for Wife to be the primary residential parent. It matters not whether this Court would have made the same decision if given the opportunity to make the initial custody determination. Our role is confined to determining whether the Trial Court abused its discretion. We hold that it did not.

The next issue is whether the Trial Court erred when it stated that its designation of Wife as the primary residential parent was temporary. The Trial Court obviously believed Husband when he claimed Wife was thwarting his ability to talk with and visit the children, a claim Wife unsuccessfully denied. The Trial Court characterized its ruling as temporary in order, hopefully, to convince Wife that her improper conduct would not be tolerated and if she insisted on this conduct, there would be ramifications.

In this State, once a valid order of custody has been issued, the initial custody determination cannot be modified unless there has been a material change in circumstances which

² One of the relevant factors is a parent's ability to provide a child with food, clothing, medical care, etc. *See* Tenn. Code Ann. § 36-6-106(a)(2). In his brief on appeal, which was filed prior to Husband becoming unemployed, Husband emphasized that he had been at the same job since 1994. Suffice it to say, assuming this factor at one time favored Husband, it no longer does.

³ Of course, in cases such as this we strongly encourage trial courts to be as detailed as possible.

makes a change in custody in the child's best interest. *See, e.g., Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Buckles v. Riggs*, 106 S.W.3d 668, 675 (Tenn. Ct. App. 2003). Because initial custody determinations can be changed upon a proper showing, initial custody determinations are, by their very nature, somewhat temporary. In the present case, if Wife interferes post-judgment with Husband's visitation and his ability to contact the children, then the Trial Court has options available to remedy this situation, such as finding Wife in contempt. In addition, this Court has stated that a "[c]hange of custody is not appropriate as a method to punish a parent for failing to comply with court orders regarding visitation.... However, a custodial parent's actions which interfere with the relationship between the child and non-custodial parent may constitute a material change of circumstances." *Roache v. Bourisaw*, No. M2000-02651-COA-R3-CV, 2001 Tenn. App. LEXIS 756, at ** 18, 19 (Tenn. Ct. App. Oct. 20, 2001), *no appl. perm appeal filed*. We agree with Wife that the language used by the Trial Court regarding the temporary nature of the custody determination should be deleted from the Final Judgment. However, in so doing we emphasize that the Trial Court's initial custody determination is subject to change in the same manner as every other initial custody determination in this State, i.e., upon a showing of a material change in circumstances, such as post-judgment interference by Wife with Husband's relationship with their two sons, which makes a change in custody in the child's best interest.

We next consider whether the Trial Court's division of marital property was inequitable and an abuse of discretion, as claimed by Husband. Courts must look to Tenn. Code Ann. § 36-4-121 when determining how to distribute marital property. This statute lists many factors to be considered by the Trial Court and include, but are not limited to: the duration of the marriage; the age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties; the tangible or intangible contribution by one party to the education, training or increased earning power of the other party; the relative ability of each party for future acquisitions of capital assets and income; and the contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role. *See* Tenn. Code Ann. § 36-4-121(c).

A trial court has wide discretion in dividing the interest of the parties in marital property. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991). As noted by this Court in *King v. King*, when dividing marital property:

The trial court's goal in every divorce case is to divide the parties' marital estate in a just and equitable manner. The division of the estate is not rendered inequitable simply because it is not mathematically equal, *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996); *Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn. 1988), or because each party did not receive a share of every item of marital property. *Brown v. Brown*, 913 S.W.2d [163] at 168. . . . In the final analysis, the justness of a particular division of the marital property and

allocation of marital debt depends on its final results. *See Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. App. 1990).

King v. King, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998) (quoting *Roseberry v. Roseberry*, No. 03A01-9706-CH-00237, 1998 Tenn. App. LEXIS 100, at *11-12 (Tenn. Ct. App. Feb. 9, 1998), *no appl. perm. appeal filed*).

In the present case, the parties agreed prior to trial on how to divide most of their personal property. The primary property issue at trial centered around the marital residence. Husband obtained an ownership interest in the house on July 26, 1998, pursuant to a warranty deed. The grantors were Husband's maternal grandparents and the property was deeded to Husband and both of his parents. Approximately 1½ years prior to this conveyance, the house was appraised at \$40,948.00. In September of 1998, Husband and Wife borrowed \$83,000 and undertook substantial renovations to the house. Wife's father provided a substantial amount of assistance in accomplishing these renovations. In November of 2002, the house had an appraised value of \$170,000. At the time of trial, Husband and Wife still owed \$78,191 on the amount they borrowed in September of 1998.

The Trial Court determined the amount of the increase in value of the house and the equity by subtracting from the most recent appraisal the value of the house at the time of the initial appraisal, i.e., \$170,000 - \$40,948, leaving the sum of \$129,052. The Trial Court then subtracted from this figure the amount of Husband and Wife's indebtedness (\$129,052 - \$78,191), leaving a total equity of \$50,861, which the Trial Court rounded up to \$51,000. The Trial Court concluded this entire amount was marital property. The Trial Court also concluded there was an additional \$16,600 in marital property from the parties' vehicles and a bank account, bringing the total amount of marital property to \$67,600. The Trial Court then awarded each of the parties one-half of the marital property, or \$33,800.

After determining the amount of each parties' interest in the marital property, the Trial Court discussed whether there should be any credits or off-sets against their respective interests. After the parties separated, Husband paid all of the house and car payments without any contribution from Wife. The Trial Court held Wife responsible for \$9,289, which represented one-half of these payments. Although Husband had been making the house and car payments, there were outstanding medical bills pertaining to the children which had not been paid by health insurance. The Trial Court concluded Husband should be responsible for \$3,687, which represented one-half of the outstanding medical bills. The Trial Court then subtracted from Wife's total share of the marital property the \$9,289 she owed Husband, and credited Wife the \$3,687 which Husband owed on the medical bills. The end result was a credit to Husband of \$5,602, thereby leaving Wife with a grand total of \$28,198 in marital property (\$33,800 - \$9,289 + \$3,687 = \$28,198). The Trial Court awarded all of the interest in the marital residence to Husband, gave Husband six months in which to pay Wife \$28,198, and granted Wife a judicial lien on the property to secure the payment.

As noted previously, the primary issue on appeal with regard to the division of marital property centers around the Trial Court's conclusion that the parties had equity totaling \$51,000 and

the entire amount of this equity was marital property. Wife claims the Trial Court was correct when it concluded all of the equity in the house was marital property because of the substantial increase in value which occurred during the marriage and because Wife's father made significant contributions to the increase by performing some of the improvements to the house. Wife does not argue before us what amount of equity should be considered marital property if the Trial Court erred in concluding all of it was marital property. Husband claims the Trial Court erred for two reasons. First, Husband argues that any ownership interest he and Wife may have is less than the amount of their indebtedness because of his parents' ownership interest, and so there is no equity whatsoever to distribute. Alternatively, Husband claims that if the Trial Court correctly determined there was equity totaling \$51,000, it nevertheless erred when it failed to determine how much of that equity belonged to the other two owners of the house, i.e., Husband's parents.

We agree with Husband that the Trial Court erred by holding the full \$51,000 of equity in the house to be marital property. Other than the warranty deed, there was no proof introduced at trial indicating how much of an interest in the property the grantors intended for Husband or his parents to have. Again, we note that Wife only argues that 100% of the equity was marital property. In the absence of any proof or convincing argument to the contrary, we feel compelled to hold that each of the three grantees listed on the deed owns basically a one-third interest in the property as a whole. It is also noteworthy that Husband's parents are not parties to this lawsuit.

Husband argues that when the ownership interest of his parents is properly taken into account, he ends up having absolutely no equity. For example, if Husband is determined to own a one-third interest in the roughly \$129,000 increase in the value of the house, then his interest would be \$43,000, which is \$35,000 less than the \$78,000 he still owes on the mortgage. While this argument is mathematically sound, it is far from equitable. It is undisputed that Wife jointly borrowed the \$83,000 for the renovations, and that Wife's father substantially contributed to the increase in value. In addition, the Trial Court gave Husband a credit for one-half of the house payments he made after the separation. We note Husband does not claim the Trial Court erred in requiring Wife to be responsible to him for one-half of the house payments Husband paid after the parties separated. Because of these undisputed facts, we believe equity demands that Wife share in Husband's interest. Neither party challenges the Trial Court's finding that the renovations to the house increased its value \$51,000 more than the corresponding indebtedness. Because Husband's parents are also co-owners, Husband should be credited with owning one-third or \$17,000 of this increase. We also conclude that this entire \$17,000 is marital property.

Husband challenges the Trial Court's conclusion that he should be responsible for one-half of the children's outstanding medical bills. According to Husband, because Wife moved to Florida the children's health care providers were out of network which resulted in a lower percentage of the medical bills being covered by health insurance. Husband asserts that he should be responsible only for one-half of the outstanding medical bills that would have existed had Wife stayed in Tennessee and utilized in network health providers. While the increase in uncovered medical bills is another unfortunate consequence of Wife's move to Florida, we cannot conclude the

Trial Court erred when it held the parties should be equally responsible for this added expense related to their children's health and thereafter credited Wife with \$3,687 in the marital property distribution.

In light of the foregoing, we will not disturb the Trial Court's various credits and off-sets in the marital property distribution, or its conclusion that dividing the marital property equally was equitable. Adding to the \$17,000 in equity the other \$16,600 in marital property results in total marital property of \$33,600. Wife's one-half interest is \$16,800. After crediting Husband with the \$5,602 as discussed above, this leaves Wife with a total interest in the marital property of \$11,198. We modify the Trial Court's judgment and hold that Husband must pay Wife the sum of \$11,198 within three months from the entry of this Court's judgment. In all other respects, the Trial Court's judgment regarding marital property is affirmed, including the award to Husband of all of the parties' interests in the marital residence, and the granting of a judicial lien against Husband's assets to secure payment to Wife of the amount she is due.

The final issue is Wife's claim that the Trial Court erred when it required her to pay her own attorney fees. Attorney fee awards are treated as alimony. *Gilliam v. Gilliam*, 776 S.W.2d 81, 86 (Tenn. Ct. App. 1988). In determining whether to award attorney fees, a trial court should consider the relevant factors set forth in Tenn. Code Ann. § 36-5-101(d)(1)(E). These factors include but are not limited to: the relative earning capacity, obligations, needs, and financial resources of each party; the relative education and training of each party; the duration of the marriage; the age and mental condition of each party; the physical condition of each party; the separate assets of each party; the provisions made with regard to the marital property; the standard of living of the parties established during the marriage; the extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions; and the relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so.

Awards of attorney fees are within the sound discretion of the trial court, and will not be disturbed on appeal unless the evidence preponderates against the award. *Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995). The only reason specifically expressed by the Trial Court for denying Wife any attorney fees was her inappropriate marital conduct. While it certainly would seem anomalous to require Husband to pay Wife's attorney fees when these divorce proceedings were brought about by Wife's admitted adultery, fault of a party is only one of the relevant considerations. Nevertheless, after considering all of the relevant factors, including Wife's need and Husband's ability to pay, we conclude the Trial Court did not abuse its discretion in requiring each party to pay his or her own attorney fees. After considering all relevant factors, we also decline to award Wife her attorney fees on appeal.

Conclusion

The judgment of the Trial Court is affirmed as modified and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are assessed one-half against the Appellant, Kevin Edward Craig, and his surety, and one-half against the Appellee, Julie Ann Craig.

D. MICHAEL SWINEY, JUDGE